Supreme Court, U.S.
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No. 99-1851

In The
Supreme Court Of The United States

GEORGE A. MAYES,
Petitioner,
- v.
LOCAL 106, INTERNATIONAL UNION OF OPERATING ENGINEERS, JANE M. LABARGE,(former) Office Manager, WILLARD J. LABARGE,(former) Business Manager, RICHARD C. KOSITZKA, (former) Treasurer, JAMES F. TOMMANEY, (former) Treasurer, JOHN J. KELLOGG, (former) President and Treasurer, FRANK LOMIO, Local 106 Coordinator, DIANE O'HARE, Office Manager, GORDON M. KILBY, Local 106 Training Fund Trustee, EUGENE HALLOCK, Local 106 Training Fund Trustee, GENE MESSERCOLA, Business Manager, ROBERT VAN DYKE, Plan Administrator, Engineers Joint Benefit Funds,
Defendants.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals for the Second Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Is the District Court's dismissal of Petitioner's Labor Management Reporting and Disclosure Act (LMRDA) Section501 claims on ground that Petitioner failed to obtain leave of the court to bring suit, and the Second Circuit Court of Appeal's affirmance of such dismissal, in concert with the decisions of other Circuit Courts of Appeal and the Supreme Court on this issue?

2. Is the District Court's dismissal of Petitioner's case on summary judgment, before discovery, and the Second Circuit Court of Appeal's affirmance os such dismissal, in concert with Supreme Court decisions concerning the rights of pro se plaintiffs?

3. Are Petitioner's allegations that the courts below have made erroneous findings of fact irrelevant to the dismissal of his suit?

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STATEMENT OF THE CASE

This action was commenced by Mr. George A. Mayes (hereinafter "Petitioner") on June 3, 1993. (Appendix 6). Petitioner, a long-time union member of Local 106, brought this action individually against the Union, several of its former business managers and officers, two office workers, as well as the plan administrator of the Union Pension Fund and the Coordinator of its Training Fund. (Appendix 11). The gravamen of the approximately 637 page amended complaint (sometimes referred to as "Mayes II") is alleged violations of the Racketeering, Influenced and Corrupt Organization act (hereinafter "RICO") 18 U.S.C. Sections 1961-1968, as well as, on the same facts, violations of the Employee Retirement Income Security Act, (hereinafter "ERISA") 29 U.S.C. Sections 1101, 1104, and 1132, the Labor Management Reporting and Disclosure Act (hereinafter "LMRDA") 29 U.S.C. Sections 411, 412, 529; The Hobbs Act, 18 U.S.C. Section 1951, and the Fair Labor Standards Act (hereinafter "FLSA") 29 U.S.C. Sections 201-219; Section 301 of the Labor Management Relation Act of 1974 ("LMRA") 29 U.S.C. Sections 185-186. (Appendix 9-10).

This case is not Petitioner's first attempt to obtain relief for his allegations. Petitioner was removed as business agent of the Union in 1980. Petitioner has instituted a prior federal lawsuit, *Mayes v. Local 106,* No. 86-CV-41, (N.D.N.Y. 1995) (herein "Mayes I") and a third federal lawsuit, *Mayes v. Messercola,* No. 94-CV-26 ("Mayes III"). (Appendix 9, 10). The prior lawsuit was resolved by dismissal of Petitioner's complaint after seven days of trial, which he conducted pro se. The Court found that Petitioner had failed to prove he had been discriminated against under the union job referral system because he failed to put into trial evidence the relevant union collective bargaining agreements. (Appendix 9). The District Court's dismissal was affirmed on appeal. (Appendix 9). The subsequent lawsuit, Mayes III, remains pending. (Appendix 9). Mr. Mayes brought the present action based, in part, on many of the acts discovered in Mayes I and based upon prima facie microfilm pension records documenting the stealing of funds

from the union treasury which continued from 1981 to 1993. (Appendix 9).

Although this action was commenced on June 3, 1993, Petitioner's allegations in this action start in 1979, over twenty years ago. (Appendix 11). Petitioner claims that a conspiracy was formed by various persons in an effort to control the affairs of Local 106 as a "RICO" enterprise. (Appendix 11). The bulk of Petitioner's claims allege unauthorized overpayments to certain union benefit funds between 1981 and 1986, and later from 1990 to 1992 (Causes of Action 2 through 12 and 24-33); alleged improper hiring of retired members at the Westerlo, New York training site (Cause of Action 13); the alleged attempted sale, at below value price, of Training Fund Real Property in Westerlo, New York in 1985 (Causes of Action 14, 19, 20, 21); alleged failure to reply to letters sent by Petitioner between 1987 and 1993 (Causes of Action 17, 19, 20, 21, 23); failure to submit LM2 reports according to the requirements of federal law, whether originally or as amended, in the years 1981-1985 (Cause of Action 18); granting union membership to unqualified and specifically named people from 1982 to 1987 (Cause of Action 15); and breach of contract under 29 U.S.C. Section 185(a), based upon all of the above (Causes of Action 1, 13-14, 15, 15, 18, 19, 20, 21, 23 and 24). (Appendix 15-16).

This action was commenced by Petitioner, who was at first acting pro se. Subsequently, Petitioner, in December of 1996, was represented by counsel for the purposes of responding to Respondent's Motion to Dismiss the Amended Complaint and Motion for Summary Judgment. (Appendix 98). Petitioner himself stated that "with the help of several Union member supporters, [he] was able to obtain the legal services of Attorney Peter Henner." (Appendix 98). Mr. Henner did not begin representing Petitioner until December, 1996, contrary to Defendants' counsel's statement on his page 2, second paragraph. (Appendix 98). Mr. Henner submitted opposition papers to the motions for dismissal and summary judgment in February, 1997. (Appendix 98).

In Attorney Walsh's Brief in Opposition to Writ, page eighteen, he sets forth the premise that the Supreme Court employs what has been termed the "two-court rule", which means they will upset concurrent findings of fact by two courts below only when there is a very obvious and exceptional showing of error. *See Goodman v. Lukens Steel Company,* 482 U.S. 656 (1987; *United States v. Doe*, 465 U.S. 605 1984). Petitioner submits the fact that on March 10, 1996, Sr. Judge Neal P. McCurn ordered both parties to file briefs on issue of res judicata and collateral estoppel, which was done by both parties. This Writ should be considered, in the light of the above action by the District Court as being an abuse of discretion, on the premise that the Court was already aware that under the LMRDA, Section 501(b), it must dismiss Petitioner's amended complaint, yet it ordered this case to proceed when it ordered both parties to file the above-noted documents. Petitioner alleges that under the United States Second Circuit Court of Appeals decision of February 15, 2000, which affirmed for substantially the reasons stated by the District Court, sets a condition precedent that the claimed abuse of discretion by the District Court is therefore adopted and affirmed by the Second Circuit Court. *See Appendix 34.*

On or about March 10, 1998, the District Court provided notice to the parties that it intended to treat the Respondent's motion as a motion for summary judgment and invited the parties to make further submissions in support of their respective positions on the pending motion. Additional submissions were made by Petitioner's counsel, Mr. Henner, as well as by Respondents' counsel. (Appendix 98).

By order and decision dated February 5, 1999, the District Court granted Respondents' motion for summary judgment. (Appendix 30). Petitioner appealed from that Order by Notice of Appeal dated March 8, 1999. (Appendix 98). In an Order dated November 19, 1999, the Second Circuit Court of Appeals affirmed. (Appendix 32-35). Petitioner petitioned the Court of Appeals for a rehearing en banc. (Appendix 94). By order dated February 15,

2000, the Court of Appeals denied that petition. (Appendix 36). On May 13, 2000, the Petitioner submitted a petition to the Supreme Court for a writ of certiorari. (Appendix 1).

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SUMMARY OF THE ARGUMENT

Petitioner's claim that the Second Circuit Court of Appeals afirmance of the United States District Court for the Northern District of New York's dismissal of his LMRDA claims is in conflict with the decisions of the Third, Fifth, Seventh and Ninth Circuit Courts of Appeal is submitted for due consideration in light of the issues of this case. Petitioner's claim that the Second Circuit's decision in his case conflicts with a Supreme Court case on this issue is correct. The decisions of the Fifth Circuit and the Supreme Court on which the Petitioner relies are relevant to the present case for due consideration.

Petitioner claims that the Court of Appeals affirmence of the District Court's dismissal of his case before discovery conflicts with two Supreme Court decisions regarding the rights of pro se plaintiffs. However, these decisions are relevant to the Petitioner's case because he was only represented by counsel in his opposition to the motions for summary judgment and dismissal. Thus, there is conflict on this issue for the Supreme Court to address.

Petitioner claims that the courts below have made erroneous findings of fact regarding his LMRA and RICO claims. The findings to which Petitioner refers are relevant to the dismissal of his case, contrary to Defendants' claim in their response. Therefore, these claims do rise to the type of systemic concern that does merit the attention of the Supreme Court.

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I. ARGUMENT

Petitioner seeks the jurisdiction of the Court under Rule 10(a) and (c) in regard to three issues: (1) the dismissal of his Labor Management Reporting and Disclosure Act (LMRDA) Section 501 claims; (2) the dismissal of his case on summary judgment before discovery; and (3) alleged erroneous findings of fact by the lower courts. Respondents' counsel alleges a new point that none of these claims have merit, nor do they rise to the level of the systemic concerns normally addressed by the Supreme Court, and, thus, none of t hem rate the attention of the Court.

Petitioner therefore submits a novel question for the Court's consideration herein. Petitioner did allege in his complaint and amended complaint that the violations under the LMRDA, Section 501 were, in fact, under the criminal aspects of Section 501(c), believing, in good faith, a necessity to allege the illegal acts that were committed by the main Defendants were covered by Section 501(c). However, the District Court on February 5th ,1999 did decide to interpret that said claims as were set forth as being Section 501(b) claims, and thereafter promptly dismissed Petitioner's action. The question is therefore raised, should not the District Court have acted prior to Summary Judgement?

A. THE DISMISSAL OF PETITIONER'S LMRDA CLAIMS DOES CONFLICT WITH CIRCUIT COURT AND SUPREME COURT DECISIONS

Petitioner wishes to respond to one of counsel's new points raised on page eight of Respondents' "Brief in Opposition to Writ of Certiorari", where, in part, counsel states, "The District Court based it's decision to dismiss Petitioner's LMRDA claims on the ground that he did not seek leave of the court to bring suit based on these claims, and not on his failure to fulfill Section 501(b)'s request requirement. *See Mayes v. Local 106*, 1999 WL 60135, 7

(N.D.N.Y.). The Court of Appeals stated that it affirmed the District Court's opinion 'for substantially the same reasons stated by the district court.' *See Mayes v. Local 106*, 201 F.3d 431, 1999 WL 1070062, 1 (wd Cir. (N.Y.)). The Court of Appeals merely noted in dicta that Petitioner's claim that a request requirement would have been futile would be insufficient to excuse him from that requirement, had the Court needed to reach that issue. *See id.* However, the Court did not reach that issue, resting instead on Petitioner's failure to seek leave of the court." Petitioner wishes to reference the fact that according to the docket index of Civil 93-CV-716, the entry No. 87 at the date of 3-11-96 was a letter order signed by Sr. Judge Neal P. McCurn directing Defendants to file brief on issue of res judicata or collateral estoppel by 7-15-96 for Motion to Dismiss and Motion for Summary Judgment, Plaintiff to file his brief and memorandum setting forth his position by 8-15-96 as to those issues and the Motion to Dismiss and/or Motion for Summary Judgment.

Petitioner asks this Supreme Court to consider where a District Court has ordered such briefs carrying a case forward this should be considered a decision by said Court to waive the requirements as have been enumerated to satisfy the requirements of the LMRDA Section 501(b). Petitioner asks the serious consideration of this Court so as to find, in the interest of justice, that the District Court should have not held, at a later date, as being against Petitioner, the hard and fast rule supposedly set by Section 501(b) requirement. Defendants and Petitioner did comply with Judge McCurn's order. Did not Judge McCurn, in 1996, waive his right to dismiss Petitioner's case, on the basis of Petitioner not fulfilling the requirement of Section 501(b), when he ordered both parties to go forward with the case, and invest the time and expense involved in doing so, in compliance with his order for submission of the foregoing documents?

Another new point raised by counsel on page twelve of Respondents' "Brief in Opposition" regarding the Third Circuit and Seventh Circuit decisions is rebuttal. Pertaining to *Sabolsky v. Budzonski*, counsel notes that the District Court had dismissed the

case because of Plaintiff's failure to observe the procedural requirements in Section 501(b). The Appellate Court reversed this decision, stating that, "A lack of formality in observing the procedures of Section 501(b) will not bar a court from granting leave, where appropriate." *See id. at 1250.* The court further held that because a request to sue would have been an exercise in futility, the plaintiff need not make such a request before bringing suit. *See id. at 1253.*

Counsel continues, on page 13, stating, "The Third Circuit subsequently clarified its holding in *Sabolsky* in *Loretangeli v. Critelli,* 853 F.2d 186 (3d Cir. 1988). *Loretangeli* recognized that Section 501(b) placed restrictions on the right to sue, and specifically stated that obtaining leave of the court to sue, upon good cause shown, was one such restriction. *Id.* at 189. The Court stated that, 'Congress designed Section 501(b)'s good cause requirement as a prerequisite to suit.' *See id.* The Court then noted that *Sabolsky* had adopted the Ninth Circuit's approach to good cause, which was stated in *Horner*. *See id.* at 190. Thus, the Court affirmed the requirement that plaintiffs obtain leave of the court before suing, while simultaneously upholding *Sabolsky's* mandate that allegations in the plaintiff's complaint may be sufficient to show good cause."

Petitioner submits that the Court, in *Loretangeli*, was considering *Dinko's* analysis of "good cause" and decided, pertaining to *Loretangeli*, that "We disagree. *Dinko* is an attempt to give the good cause requirement a more precise content, but the standard adopted is not mandated by the statute's language, finds no support in LMRDA's legislative history, conflicts with the congressional policy of protecting union members, and permits summary elimination of meritorious as well as vexatious suits."

Petitioner submits that unless this writ is granted, the stealing of almost a half million dollars from the Local 106 International Union of Operating Engineers' Treasury will go completely unpunished. Petitioner has already placed before the

Court the relevant records of microfilm copies of pension records, placing prima facie proof of the crimes alleged by Petitioner before the Court. Again, Petitioner submits that the District Court's holding, based on the strict requirements under Section 501(b), should be considered as having been waived in 1996 by the District Court when Sr. Judge Neal McCurn had full personal knowledge that Petitioner had not sought permission of said Court to file suit, yet Judge McCurn ordered the case to go forward. Petitioner requests, in the interest of justice, that this Court consider the District Court's decision dismissing his entire case--based on a primary factor of Petitioner's non-compliance with Section 501(b)--to be an abuse of discretion. Petitioner wishes to also note for the record that always and up to this point in time he was acting pro se.

B. DISMISSAL OF PETITIONER'S CASE BEFORE DISCOVERY DOES CONFLICT WITH SUPREME COURT DECISIONS CONCERNING THE RIGHTS OF PRO SE PLAINTIFFS

Petitioner, on June 3, 1993, acting pro se, filed his original complaint, and on July 26, 1996, filed his amended complaint, Docket Index No. 91, again acting pro se. Defendants, on October 4, 1996, filed their Motion to Dismiss and/or for Summary Judgment, Docket Index. No. 98. Petitioner was still acting pro se at the time of said filing.

Petitioner wishes to correct opposing counsel's statement on page fifteen of Respondents' Brief in Opposition, wherein counsel stated, "The record expressly states that Petitioner was represented by Attorney Peter Henner, beginning October, 1996, and that Mr. Henner acted on Mayes' behalf to oppose the Respondents' motions." Petitioner submits that the Docket Index entry for December 23, 1996, No. 103, notes; "Notice of Attorney Appearance for George A. Mayes by Peter Henner." Petitioner was working on this case pro se up until he hired Attorney Henner in December of 1996.

C. PETITIONER'S FACTUAL ALLEGATIONS ARE RELEVANT TO THE DISMISSAL OF HIS CASE

Addressing the number one question presented for the Supreme Court's consideration; the question of the "Two-court rule" as that legal premise must apply to Petitioner's alleged claim of the District Court's abuse of discretion in that as Petitioner was pro se from June, 1993 to December 1996 a period of time spanning more than three years, during which time the District Court knew Petitioner's case must be dismissed. Petitioner's original complaint consisting of over 400 pages due to a civil RICO complaint in compliance with federal rule of civil procedure 9(b) as to specificity admitted freely that Petitioner had not approached the union to take legal action, nor had he requested the Court for permission to sue. Petitioner's amended complaint of approximately 637 pages, which also met the requirement of rule 9(b) as to specificity for a RICO complaint, also admitted Petitioner had not requested the union officials to take legal action nor had he sought permission of the court to file suit.

Therefore, under Attorney Walsh's claimed, "Two-court rule" Petitioner asks this Court to find that Sr. Judge Neal P. McCurn's ordering briefs on res judicata and collateral estoppel on March 11, 1996 documents an act by the District Court that amounts to a judicial abuse of discretion, where said Court has primary knowledge that Petitioner's complaint must be dismissed.

The Court, with this knowledge, on or about March 10, 1998, converted Defendants' Motion to Dismiss to Motion for Summary Judgment, again with the District Court's full knowledge that Petitioner's complaint must be dismissed for failing to observe the requirement of LMRDA Section 501(b).

The findings and decisions of the Second Circuit Court of Appeals, of February 15, 2000, which stated, "We affirm for substantially the reasons stated by the District Court.", therefore

must be construed as having adopted said District Court's act of abuse of discretion in allowing Petitioner's civil action 93-CV-716 to go forward.

*

CONCLUSION

Petitioner requests in the interest of justice, where no discovery was allowed in six years of litigation, but where Petitioner has placed prima facie copies of micro-film records into Court records, fully documenting the stealing of almost a half million dollars from Local 106 Union Treasury, from 1981 to 1993, that this Court allow this Writ to go forward.

Petitioner, not being a lawyer, lacks the finesse to set forth every relevant legal argument for consideration, but begs this Court's consideration of the truth and documented facts already in the Court records to allow this Writ to go forward.

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Date: July 17th, 2000

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